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No. 01-1083

Supreme Court U.S.
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In The

Supreme Court of the United States

TEXTRON INC., *et al.*,

Petitioners,

v.

COMMISSIONER OF REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Textron Inc. does not have a parent company, nor does any other publicly held company own 10% or more of Textron Inc.'s stock. Each of Textron Inc.'s affiliates that is a party to this case is a wholly-owned subsidiary of Textron Inc.

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REPLY BRIEF FOR PETITIONERS

Respondent makes three points in its Brief in Opposition. First, the lower court's decision was allegedly based on independent and adequate state grounds. (Br. Opp. 2-7.) Second, the case purportedly lacks national significance. (Br. Opp. 7.) Third, the state statutory scheme allegedly does not discriminate against interstate commerce because the lower court concluded that the scheme is not discriminatory (Br. Opp. 9-10), and because the overall discrimination inherent in the statutory scheme has supposedly been "erased" by the state's unilateral decision not to enforce some of the discriminatory provisions. (Br. Opp. 11-12.)

None of these points has substance. First, the decision of the Supreme Judicial Court of Massachusetts does not rest upon independent and adequate state grounds. Second, respondent's assertion that this case lacks "national importance or applicability" is belied by this Court's clear pronouncements that the Commerce Clause protection against discrimination in the area of state taxation is of great importance to the national economy. Third, respondent's defense to the statute's facial discrimination disregards this Court's controlling Commerce Clause doctrine and fails to respond to the incontrovertible fact that the state's tax scheme favors in-state over out-of-state corporations.

In short, as we demonstrate below, an analysis of respondent's Brief in Opposition reinforces the case for certiorari.

I. THE LOWER COURT'S DECISION DID NOT REST UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

Respondent's contention that the decision of the Supreme Judicial Court of Massachusetts rests upon independent and adequate state grounds is erroneous. Respondent argues that, because the lower court indicated in *dicta* that the "repeal and revival remedy" would not be available in this case, any federal questions arising in the case need not be addressed by this Court. (Br. Opp. 2-4.) This argument is without merit.

This Court's decisions clearly establish that the presence or absence of a tax refund is not an independent and adequate state ground, and therefore does not preclude this Court from considering the constitutional issues presented by petitioners. In *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276 (1932), the taxpayer brought suit to set aside an assessment of state income taxes. The taxpayer argued that it was a denial of equal protection to exclude income from sources earned outside the state from taxable income for corporations, but to include such income for individuals. The state court refused to pass on the constitutional claim, reasoning that if the exclusion for corporations were invalid, the result would be that they owed greater taxes, not that the taxpayer would owe less. The Supreme Court ruled that this state ground was not an adequate basis for avoiding the constitutional question:

> [T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected

> when such judicial action is properly invoked. . . . If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked. . . . *We therefore conclude that the purported nonfederal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory.*

Id. at 282-83 (emphasis added, citations omitted). *See also Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (in a case involving an equal protection challenge to a state tax statute, held that the state's "power to equalize the treatment of the petitioners and the competing domestic corporations by compelling the latter to pay hereafter the unpaid balance of the amounts assessed . . . is not material").

Likewise, in a subsequent case with remarkable similarities to this case, the Court confirmed that even the absence of a tax refund is not a basis for refusing to consider a constitutional question and cannot deprive a taxpayer of an opportunity to raise a constitutional challenge to a state tax. In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), the taxpayer challenged on equal protection grounds a state tax provision that exempted from property tax merchandise and products owned by nonresidents, but provided for no exemption for residents. As in this case, the state court in *Allied Stores* declined to consider the constitutional question because,

in its view, the taxpayer lacked standing since, even if the offending provision were stricken, the taxpayer would not be entitled to a refund. This Court rejected that reasoning: "The proviso is the basis of appellant's claim of denial of the equal protection of the laws. With the proviso thus validly remaining in the statute it is *quite immaterial* that appellant's claim necessarily would fall if it were out. It follows that appellant does have standing to prosecute its constitutional claim." *Id.* at 526 (emphasis added).

Allied Stores and *Lawrence* establish that the absence of a tax refund is not an independent and adequate state ground for the state court's decision. Just as the refusal of the state courts to decide the constitutional question on standing grounds and on remedy grounds was a denial of the taxpayers' constitutional rights in *Allied Stores* and *Lawrence*, respectively, the refusal of the Supreme Judicial Court of Massachusetts to consider petitioners' discrimination claims on standing and remedy grounds is a denial of petitioners' constitutional rights in this case. The alleged state ground – the nonavailability of the "repeal and revival remedy" under Section 52 of the Massachusetts General Laws – is "unsubstantial," "illusory," and "quite immaterial."

Moreover, respondent's declaration that "[t]he *judgment* denying the remedy rests on an independent and adequate state ground" is not an accurate statement. (Br. Opp. 4 (emphasis added).) In fact, the court below held that petitioners lacked standing and disposed of the case on that ground. The lower court's discussion of the constitutional questions and the "repeal and revival remedy" was *dicta*. Accordingly, because the lower court did not

render a judgment on the remedy issue, the remedy issue cannot serve as an independent and adequate state ground for the court's decision.

Respondent's reliance on *Herb v. Pitcairn*, 324 U.S. 117 (1945), is misplaced. That case, cited by respondent merely for the undisputed principle that this Court will not review judgments of state courts that rest on adequate and independent state grounds, did not consider the specific tax issues raised here. In any event, the Court in *Herb* did not conclude that the state court's decision was based on an adequate and independent state ground. The Court held that the case should be continued to enable counsel to apply to the state court for an amendment or clarification indicating whether the court intended to rest the judgments at issue on state or federal grounds. *Id.* at 128. Accordingly, that case is of no relevance here.

In sum, respondent's contention that the lower court's decision is based on independent state grounds is both factually and legally deficient. This Court has the authority to consider each of the issues raised in the petition.

II. THIS CASE HAS NATIONAL SIGNIFICANCE

Respondent's assertion that this case lacks national significance is unpersuasive. Respondent provides no basis for its contention that this case lacks national significance; instead, respondent's brief merely cites to this Court's Rule 10, which provides that a petition for a writ of certiorari is rarely granted when the asserted error

consists of factual error or the misapplication of a properly stated law. (Br. Opp. 7.) Respondent offers no explanation why Rule 10 lessens the national importance of the issues raised in this case. There is no dispute as to the facts of the case. The decision below affects *every* multistate corporation doing business in Massachusetts. It undermines constitutional limitations on state taxation and threatens the national economy.

The Massachusetts court's decision held that taxpayers do not have standing to sue for a refund of taxes paid by them under a facially invalid statute. That holding conflicts with this Court's decisions and basic notions of due process. If left undisturbed, it would undermine state tax administration. Taxpayers must be assured of the right to fairly contest the propriety of taxes collected by the states.

The disputed statute, which provides additional deductions to domestic corporations and which treats corporations more favorably if they invest in in-state subsidiaries or engage solely in business in the state, is without question discriminatory. The importance of the free flow of commerce among the states is clear. It is equally clear that any threat to the flow of commerce is of overriding national importance.

Finally, respondent's attempt to minimize the national significance of this case is belied by the amicus briefs filed by the Council on State Taxation (COST) and General Motors Corporation. COST has a membership of over 500 multistate corporations engaged in interstate and international commerce, and General Motors is one of the largest corporations in the world. The interest that

COST and General Motors have expressed in this case, and their concern over its widespread implications, demonstrate the national importance of this controversy.

III. RESPONDENT OFFERS NO DEFENSE TO THE STATE'S DISCRIMINATORY TAX SCHEME

Respondent defends the state's discriminatory statutory scheme by merely referencing the lower court's decision. (Br. Opp. 10.) What the respondent fails to appreciate, however, is that the state court's reasoning is deficient and is incompatible with this Court's decisions striking down discriminatory state tax provisions. As described in detail in the petition, the Massachusetts statutes allow domestic, but not foreign, corporations classified as intangible corporations two additional deductions in arriving at the net worth tax base. The Massachusetts statutes require foreign corporations to apply a different and less favorable formula for classification as a tangible or intangible corporation, and the foreign corporation classification formula is skewed against those corporations with foreign, but not domestic, subsidiaries. These features of the Massachusetts tax scheme clearly burden interstate commerce.

While recognizing that a taxpayer "could show an impermissible burden" on interstate commerce arising from these provisions (App. 15a), the lower court concluded that on the record in this case, it could not state with certainty whether the challenged provisions are unconstitutional. (*Id.*) The state court mistakenly assumes that discrimination is measured on a taxpayer by taxpayer basis. In essence, the court held that discrimination

could be proved only if the petitioners established actual discrimination adversely affecting them.

This Court has rejected such an analysis. Under the Commerce Clause, a statute is not discriminatory in some instances and non-discriminatory in other instances. According to the Court, " 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). In this regard, it is of no consequence that some out-of-state taxpayers may actually benefit under the tax scheme if the overall tax scheme "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.' U.S. Const., Art. I, § 8, cl. 3." *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (holding that a state axle tax is not saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers). Here, the plain language of the challenged provisions facially discriminates against out-of-state corporations, thereby exerting "inexorable hydraulic pressure on interstate businesses to ply their trade within the State." *Id.* at 286.

Finally, respondent's claim that the challenged statutes do not discriminate against interstate commerce is belied by its admission that "any constitutional effect of [the state's tax scheme] was 'erased' by the Commissioner's issuance of administrative guidance." (Br. Opp. 11.) The "constitutional effect" referred to in respondent's

brief is, of course, merely a euphemism for the discrimination that is at the heart of this case. For respondent to, on the one hand, continue to assert that the state's statutes do not discriminate against interstate commerce, and, on the other hand, acknowledge the discrimination and assert that it has been "erased" by administrative guidance is disingenuous. In the end, the respondent's voluntary attempt to, in substance, rewrite the state's statutes in a manner consistent with the Constitution cannot save the challenged statutes at issue here. The administrative guidance does not eliminate all discrimination, does not have the effect of a statute or regulation and can be changed or withdrawn at any time.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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